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June 8, 2012
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GEORGETOWN LAW
INSTITUTE FOR PUBLIC REPRESENTATION

June 8, 2012

Ms. Marlene H. Dortch, Secretary
Federal Communications Commission
445 Twelfth St., SW
Washington, DC 20554

Via electronic filing

Re: Notice of *Ex Parte* Presentation in: *Children's Television Obligations of Digital Television Broadcasters*, MM Dkt. 00-167, and *Sponsorship Identification Rules and Embedded Advertising*, MB Dkt. 08-90

Dear Ms. Dortch:

On June 6, 2012, Jeff McIntyre, Director, National Media Policy for Children Now, Angela Campbell and Laura Moy of Georgetown Law's Institute for Public Representation, counsel to Children Now, and Georgetown Law student Margarita Varona (collectively "Children Now") met with Josh Gottheimer, Senior Counselor to Chairman Genachowski, Jordan Usdan, Deputy Director of the Public-Private Initiative, and Mary Beth Murphy and Kim Matthews of the Media Bureau. The purpose of the meeting was to follow up on the letter sent by Children Now and American Academy of Pediatrics to Chairman Genachowski on April 11, 2012. During the meeting, Children Now urged the Commission to finalize its tentative conclusion that interactive advertising on children's programs is contrary to the public interest, to clarify that its existing advertising limits and policies intended to protect children from excessive or unfair advertising practices apply to video on demand, to adopt a rule to make it explicit that product placements and embedded advertising are not permitted in children's programs, and to carefully review whether broadcast licensees and cable operators are complying with the requirements of the Children's Television Act (CTA).

A. The Commission Should Finalize its Tentative Conclusion on Interactive Marketing

Children Now urged the Commission to make final its tentative conclusion to “prohibit interactivity during children’s programming that connects viewers to commercial matter unless parents ‘opt in’ to such services.” This tentative conclusion was reached in the Report and Order and Further Notice of Proposed Rulemaking in Docket 00-167, released November 23, 2004. At the time, the Commission explained that adopting a rule would be premature because there was “little if any use of direct Internet connectivity” to television.

Since 2004, and even since 2010, when Children Now filed comments in response to the *Notice of Inquiry, Empowering Parents and Protecting Children in an Evolving Media Landscape*, MB Docket No. 09-194, asking the Commission to finalize its tentative conclusion, many new technologies and marketing practices have developed. Broadcasters, cable networks and advertisers have responded to diminishing ratings for real-time programming by adopting interactive practices and developing tactics to specifically target certain viewers. Children’s television, which too is largely reliant on advertising and experiencing diminishing ratings, is facing pressures to follow suit.

Children’s media companies are increasingly making their network programming available to children on multiple outlets and platforms. *Why Kids’ TV is Scrambling to Stay Afloat*, Hollywood Reporter, May 17, 2012. Programs aimed at young children, such as Nickelodeon’s *Dora the Explorer*, have dedicated Facebook pages even though the program’s target audience is too young to have a Facebook account. Many children’s programs are currently available on Hulu and other video streaming services. When a child watches a program on Hulu, she will first have to watch an advertisement. Clicking on any portion of the screen during the ad, even accidentally, immediately opens a new webpage for the advertised product or company.

Websites operated by children’s media companies are in some cases providing inadequate separation between streaming programs and streaming commercials. For example, the Cartoon Network webpage (http://www.cartoonnetwork.com/tv_shows/index.html) provides links to videos and games for all Cartoon Network shows. Among the links to these shows is a link to a two-minute video commercial for Legos. The format for the Lego ad mimics the format of the shows, except for the notation “[AD]” in front of the title. This notation is not sufficient to provide a clear separation between advertising and program material. In fact, this promotion appears to be intended to blur the distinction between programming and advertising. The Lego/Cartoon Network ad campaign won an award in the Internet Advertising Competition for Best Toy and Hobby Online Campaign. The award submission (attached) explains their strategy:

In a first-ever partnership of its kind, Cartoon Network essentially created a “Lego Channel” alongside its own shows in a way that mimicked the way kids consume Cartoon Network show content. Cartoon Network and Lego designed a programming schedule of sorts with timed video and game releases timed around product launches with

promotional activation that followed the same model used by Cartoon Network to promote its own shows.

Children Now expressed concern that in the absence of clear and enforceable restrictions, children's programmers are likely to start using many of the interactive marketing techniques now being used in programs intended for teen or general audiences. Increasingly, networks are utilizing third-party social media platforms to increase interactivity with programming. For example, during the MTV Movie Awards, MTV encouraged fans to vote for characters such as *Harry Potter* via Twitter. *MTV Revs Up Social Efforts Around Annual Movie Awards*, *Advertising Age*, May 29, 2012. This is part of a broader strategy that MTV executives call "storytelling without borders." Joe Mandese, *And The Award For Best Social Media Extensions Goes to MTV*, *ONLINEMEDIADAILY*, May 29, 2012. In addition to using Twitter and Facebook, MTV plans to use Instagram, so users can create their own real-time animated images, and Foursquare, so that viewers can "check in." MTV expects that these social media components will become standard features on programs such as *Teen Wolf*. *Id.*

Many programs today have associated Twitter hashtags that marketers can use to communicate with viewers. For example, the attached screen shot shows that a Twitter search for "#MadMen" yielded a Tweet from Jaguar USA promoting their E-type car. Some Fox programs such as *New Girl* and *Fringe* provide hash tags onscreen so that viewers can tweet about a show while watching. A smartphone app, Miso, allows viewers "check-in" to a program they're watching. <http://gomiso.com/sideshows>. The app includes a new feature, "SideShow," which works alongside a television program. When viewers "check-in" to a specific show on their web-enabled smartphones, the app will follow where they are in the episode and display relevant "cards" that work like pop-ups related to what is being said or done in the specific program. For example, if a viewer checks into the CW's fashion-heavy *Gossip Girl* "when a notable outfit appeared on screen, the SideShow would bring up a card with more information about the clothes, as well as an image and an online shopping link."¹

New techniques also allow marketers to precisely target audiences. The more precisely an ad is targeted to a child, the more marketers can take advantage of that child's vulnerabilities. A recent example of targeted marketing is Viacom's "Surround Sound." See attached Press Release, *Viacom Introduces "Surround Sound" Cross-Platform Audience Targeting for Advertisers* (Mar. 12, 2012). The Head of Sales for Viacom's Nickelodeon Group" explains that "With 'Surround Sound,' we're offering advertisers the sustainable, scalable ability to reach very specific consumers across every screen we program, from television to online video, premium display, mobile and even email advertising inventory."

Children Now is not aware of any commercial interactivity on children's television programs at this time, in large part due to the Commission's 2005 tentative conclusion that such activity would not be in the public interest. However, now that the technologies and techniques have been developed and put into effect on other platforms and on programs not intended primarily for children 12 and under, it is only a matter of time before someone decides to test the

¹ Anthony Ha. "Miso Takes Social TV Beyond Check-Ins." *Ad Week*. Dec. 14, 2011. <http://www.adweek.com/news/technology/miso-takes-social-tv-beyond-check-ins-137098>.

waters. Thus, it is important that the Commission promptly adopt an enforceable rule against interactive advertising on children's programming. In addition, the Commission should clarify how its existing rules, such as the "web crawl rule," apply to new marketing techniques such as onscreen Twitter hashtags.

B. The Commission Should Clarify that its Children's Advertising Policies Apply to Video-on-Demand.

The popularity of video on demand (VOD) has dramatically increased in recent years. VOD featuring children's programming is included in most packages offered by cable providers. To the average viewer, VOD programming is indistinguishable from other MVPD programming. Although currently VOD programming carries fewer commercials than traditional programming, that is likely to change as ratings on VOD programming begin to be considered. In comments filed in Docket 00-167, Disney asked the Commission to exempt video on demand programs from the advertising limits.² Children Now opposed this request in prior comment.³ Children Now urges the Commission to make clear that children's commercial restrictions equally apply to VOD.

C. The Commission Should Clarify that Existing Rules and Policies Prohibit Product Placement in Children's Programming

In its 2008 *Notice of Proposed Rulemaking on Sponsorship Identification Rules and Embedded Advertising*, Docket No. 08-90, the Commission stated its belief that "embedded advertising in children's programming would run afoul of our separation policy."⁴ Nonetheless, it sought further comment as to whether such a ban should be made explicit. The Comments filed by the Children's Media Policy Coalition, of which Children Now is a member, strongly agreed with the FCC's interpretation and supported clarification that embedded advertising is prohibited in all children's programming, regardless of whether it is distributed on a free or pay channel.⁵ However, the FCC has not taken any further action in this rulemaking, or in response to the Notice of Inquiry in the same docket that solicited comment on whether the Commission should take action with respect to embedded advertising more broadly.

In the meantime, embedded advertising on non-children's programs has grown increasingly subtle and sophisticated and the lines between content and commercial have become increasingly blurred. When asked whether certain brands mentioned on *Mad Men* were paid placements, AMC President Charlie Collier replied: "we absolutely have product integration on

² *Comments of The Walt Disney Company*, MM Dkt. 00-167 (filed April 1, 2005) at 16.

³ *Reply Comments of Children's Media Policy Coalition, Free Press, Campaign for a Commercial-Free Childhood, Dads and Daughters*, MM Dkt. 00-167 (filed May 2, 2005) at 13.

⁴ *Sponsorship Identification Rules and Embedded Advertising*, Notice of Inquiry and Notice of Proposed Rulemaking, 23 F.C.C.R. 10682, 10691-92 (2008).

⁵ *Comments of Children's Media Policy Coalition*, MM Dkt. 00-167 (filed Sept. 22, 2008).

the show, but you shouldn't know which ones are paid and which ones aren't."⁶ Thus, it is important that the Commission make clear that no embedded advertising is permitted on children's programming.

D. The Commission Should Carefully Assess Whether Broadcasters and Cable Operators are Meeting their Statutory Obligations

In the 2004 *Report and Order*, the Commission modified its processing guideline for children's education and informational (E/I) programming so that the guideline would proportionally increase if a station chose to provide free, multicast programming.⁷ On reconsideration, the Commission reaffirmed that this change was fair to broadcasters, would advance the goals of the Children's Television Act (CTA) and was consistent with the First Amendment.⁸

Children Now observed that the television license renewal cycle was about to begin and would provide the Commission with the first opportunity after the transition to digital broadcasting to assess whether the modified guideline was effective in increasing the availability of E/I programming for children. Past experience indicates that much of what broadcasters are labeling E/I is in neither educational nor informational. Thus, the Commission should carefully review the showings made in renewal applications to ensure that broadcasters have served the educational needs of children in their programming.

Children Now also noted that under the CTA, the advertising limits apply to cable as well as broadcast television. The GAO Report released July 2011 criticized the Commission for failing to review whether cable operators were complying with the CTA and recommended that the Commission develop and implement an oversight strategy. *Children's Television Act: FCC Could Improve to Oversee Enforcement and Provide Public Information*. available at <http://www.gao.gov/products/GAO-11-659>. Given that the GAO also found that most of children's television viewing occurs on cable, it is particularly important that the Commission enforce the advertising limits with respect to cable.

If you have any questions regarding this filing, please do not hesitate to contact me.

Respectfully Submitted,

/s/ Angela J. Campbell
Angela J. Campbell
Counsel for Children Now

⁶ Todd Wasserman. "Mad Men's Secret Product Placements." *Ad Week*. Aug. 17, 2009. available at <http://www.adweek.com/news/advertising-branding/mad-mens-secret-product-placements-106276>.

⁷ *Children's Television Obligations of Digital Television Broadcasters*, Report and Order and Further Notice of Proposed Rulemaking, 19 F.C.C.R. 22943, 22952-54 (2004).

⁸ *Children's Television Obligations of Digital Television Broadcasters*, Second Order on Reconsideration and Second Report and Order, 21 F.C.C.R. 11065, 11072 (2006).

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cc: Josh Gottheimer
Jordan Usdan
Mary Beth Murphy
Kim Matthews